



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of a Claim Against the Dealer Bond
of JAPCO, Ltd., d/b/a AJ Auto Sales

Case No. TR-99-0012

FINAL DECISION

On May 11, 1999, Robert and Shari Foucault filed a claim with the Wisconsin Department of Transportation against the motor vehicle dealer bond of JAPCO, Ltd., d/b/a AJ Auto Sales. The claim along with documents gathered by the Department in its investigation of the claim was referred to Division of Hearings and Appeals for hearing. On August 16, 1999, a Public Notice of Time to File Dealer Bond Claim was published in The Milwaukee Journal Sentinel, a newspaper published in the City of Milwaukee, Milwaukee County. The notice informed other persons who may have claims against JAPCO, Ltd., d/b/a AJ Auto Sales to file them with the Department by October 15, 1999, and scheduled a hearing on the claims for October 25, 1999. No additional claims were filed.

By letter dated October 20, 1999, the Administrative Law Judge cancelled the hearing and instructed the parties to file any additional materials that they wished to have considered in making the Preliminary Determination by October 25, 1999. No additional information was received. A Preliminary Determination based on the documentation contained in the file and required by sec. Trans 140.26(4)(a), Wis. Adm. Code, was issued on November 1, 1999.

On November 24, 1999, Attorney Martin J. Brennan, on behalf of JAPCO, Ltd., d/b/a AJ Auto Sales, filed an objection to the Preliminary Determination pursuant to sec. Trans 140.26(5)(b), Wis. Adm. Code. Pursuant to due notice a hearing under sec. Trans 140.26(6), Wis. Adm. Code, was conducted in this matter on February 17, 2000, in Waukesha, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Robert and Shari Foucault
3249 South Wollmer Road
West Allis, WI 53227

JAPCO, Ltd., d/b/a AJ Auto Sales, by
Attorney Martin J. Brennan
4406 South 68th Street, Suite 102
Greenfield, WI 53220

Heritage Mutual Insurance Company
2800 South Taylor Drive
P. O. Box 58
Sheboygan, WI 53082-0058

No Appearance

Peerless Insurance Company
1225 Corporate Blvd., Suite 101
Aurora, IL 60504

No Appearance

The Preliminary Determination issued in this matter awarded Robert and Shari Foucault \$9,042.00 and ordered the Foucaults to surrender possession of the vehicle to Peerless Insurance Company. The basis of this determination was that the Foucaults never received a Wisconsin title or registration for the vehicle. The Dealer objected to the Preliminary Determination and a hearing was conducted.

At the hearing Gary Lesniak, owner of JAPCO, Ltd, d/b/a AJ Auto Sales, testified that he sent the title for the vehicle to the Department of Transportation, Department of Motor Vehicles (DMV), but apparently the DMV never received it. Mr. Lesniak testified that he then requested a duplicate copy of the title from Budget Rent-a-Car, the previous owner of the vehicle. As proof of this request, he submitted as an exhibit an undated letter signed by a Gina Carbonetti stating that she sent the title to Funeral Service Credit Union, the Foucaults lien holder for the vehicle.

The Foucaults testified at the hearing that they still had not received a title to the vehicle and that they were being pressured by Funeral Service Credit Union because it had still not been able to perfect its security interest in the vehicle. The DMV investigator, at the time he completed his investigation of the Foucaults' complaint, indicated that the DMV records show the vehicle titled "for records only." This notation indicates no title is available for the vehicle. Mr. Lesniak admitted at the hearing that he did not submit the title to the DMV within seven business days following the sale of the vehicle as required by sec. 342.16(1), Stats. Although this is a violation of a statute regulating motor vehicle dealers, the fact that the title was submitted late would not have resulted in any loss to the Foucaults if they had in fact subsequently received a title to the vehicle.

There is no reason to doubt that Mr. Lesniak send the title to the DMV after the sale of the vehicle to the Foucaults or that he later requested a duplicate copy of the title from Budget Rent-a-Car after the DMV did not receive the initial title or title application. However, it is inexplicable why Mr. Lesniak made no further effort to ensure that the Foucaults did receive a title to the vehicle after they filed a complaint and later a bond claim with the Department of Transportation. As the dealer, ultimately JAPCO, Ltd. is responsible for ensuring that the title to the vehicle purchased by the Foucaults is transferred to their name. Until this happens, the Foucaults are in possession of a vehicle that they can not lawfully operate on public highways or sell. Accordingly, the Foucaults have sustained a loss as a result of the Dealer's failure to properly transfer title of the vehicle to the Foucaults.

Although not a finding in the Preliminary Determination, at the hearing, Mr. Lesniak admitted that no Wisconsin Buyers Guide was ever completed for the vehicle purchased by the Foucaults. Mr. Lesniak described an informal transaction between his dealership and Robert Foucault who did some collection work for his dealership. Mr. Lesniak further testified that he acknowledged to Mr. Foucault that no presale inspection of the vehicle had been completed for the vehicle; however, he promised to repair any defects Mr. Foucault found on the vehicle. He apparently did keep his promise to a reasonable extent.

Mr. Foucault testified that the vehicle is unsafe to drive, a fact which Mr. Lesniak vigorously disputes. It is impossible to make a finding regarding whether this vehicle is or is not road worthy from the evidence in the record. However, pursuant to sec. Trans 139.04(6), Wis. Adm. Code, a dealer must display a completed Wisconsin Buyers Guide on any vehicle offered for sale and pursuant to sec. 139.05(11), Wis. Adm. Code, a dealer shall not execute a purchase contract for a used vehicle with a "retail purchaser until the vehicle has been inspected and the findings disclosed a required by secs. 139.04(4) and (5), Wis. Adm. Code." Since this was not done, Mr. Lesniak should not have sold the vehicle to the Foucaults. If no sale had occurred, the Foucaults would not have sustained the loss they are now claiming. The Foucaults are entitled to reimbursement of their purchase price for the vehicle and, in turn, should surrender possession of the vehicle to the bonding company.

The Preliminary Determination is modified to include as a second violation on the part of the Dealer, his failure to complete a presale inspection and display a Wisconsin Buyers Guide on the vehicle at the time it was sold to the Foucaults. Other than this modification, the Preliminary Determination is adopted as a final determination in this matter.

FINDINGS OF FACT

1. JAPCO, Ltd., d/b/a AJ Auto Sales (Dealer) was licensed by the Wisconsin Department of Transportation as a motor vehicle dealer. The Dealer's facilities were located at 2520 West Forest Home Avenue, Milwaukee, Wisconsin, 53215. The Dealer's motor vehicle dealer license expired on November 30, 1998 and was not renewed.

2. The Dealer had a bond in force from August 1, 1996 to the present. (Bond #S00849 from Heritage Mutual Insurance Company from August 1, 1996 to May 25, 1998, and Bond #01893-08-86 from Peerless Insurance Company from May 15, 1998 to the present date.)

3. Robert and Shari Foucault purchased a 1995 Hyundai Elantra, vehicle identification number KMHJF23M8SU895368, from the Dealer. The Foucault's paid \$9,042.00, including sales tax and registration fees, for the vehicle. The purchase contract was executed on May 22, 1998. According to the purchase contract a portion of the manufacturer's new vehicle warranty remained on the vehicle and the Dealer agreed "to provide additional warranty on items not covered by manufacturer's warranty for 30 days from delivery date." The Foucaults paid for the vehicle and the vehicle was delivered to them on July 1, 1998. The Wisconsin Title and License Plate Application (MV-11) was also executed on July 1, 1998. The MV-11 lists July 1, 1998, as the purchase date of the vehicle.

4. At the time the Foucaults purchased the vehicle, it was being repaired at a site away from the Dealer's facilities. The Dealer never completed a presale inspection of the vehicle and no Wisconsin Buyers Guide was posted on the vehicle as required by sec. Trans 139.04, Wis. Adm. Code. The Dealer told the Foucaults he would repair any problems they discovered with the vehicle.

5. The Foucaults returned to the Dealer approximately two weeks after accepting delivery of the vehicle with a list of defects and problems they discovered with the vehicle. The Foucaults took the vehicle back to the Dealer several times. Apparently some of the problems were remedied but not all. Robert Foucault filed a complaint with the Wisconsin Department of Transportation (Department) on February 9, 1999. In that complaint he stated that Gary Lesniak, the owner of the dealership, at some point refused to make any additional repairs and the telephone at the dealership was disconnected. Mr. Foucault did not indicate which specific problems still needed to be repaired. He also did not indicate whether he had ever attempted to have any repairs done at a Hyundai dealership under the manufacturer's warranty.

6. In the complaint he filed on February 9, 1999, Mr. Foucault also stated that he had never received the title to the vehicle. After investigation, the investigator for the Department concluded "[i]t appears that [the Dealer] did fail to submit [the Foucault's] application for title to the [Division of Motor Vehicles]." Gary Lesniak could not be located during the investigation.

7. On May 11, 1999, the Foucaults filed a claim against the Dealer's bond. The total of the claim is \$13,381.00 and is itemized as follows:

DAMAGES CLAIMED	ITEM DESCRIPTION	ITEM AMOUNT
1995 Hyundai Elantra (Unusable)		\$9,043.00 (sic)
Insurance (For 18 months)(\$348.00 Every 6 Months)		\$1,044.00
Loan Payments (\$305/Mo.) (\$183.00 Total – 60% of Loan) (For 18 Months)		\$3,294.00

8. The Dealer failed to submit the title and application for title to the Department within seven business days of the sale as required by sec. 342.16, Stats. The Foucaults have not received the title to this vehicle and consequently are unable to lawfully operate or sell the vehicle. The Foucaults are entitled to a refund of the purchase price of the vehicle.

9. The Foucaults are also seeking reimbursement of \$183.00 per month for the payments they made on the loan they obtained for the vehicle. The \$183.00 payment includes principal and interest on the loan. The Foucaults are not entitled to reimbursement for the principal amount of their loan payment in addition to the purchase price of the vehicle. This would be double counting. The Foucaults are also not entitled to reimbursement of the interest portion of the loan payment. Section Trans 140.21(2)(e), Wis. Adm. Code, provides that claims for interest are to be disallowed.

10. The Foucaults are also claiming \$1,044.00 for eighteen months of premiums for the insurance coverage of the vehicle. As documentation for this portion of their claim the Foucaults provided a premium invoice for insurance coverage for the period from June 8, 1999 to December 8, 1999. This time period is after the bond claim was filed. There is no explanation why the Foucaults intended to continue liability insurance coverage during this period since they note on the invoice that they had purchased a third vehicle because they needed two vehicles and the Hyundai did not "work." The Foucaults did not provide documentation of the cost of insurance premiums for the Hyundai for any other time period they owned the vehicle or any evidence that they actually paid any insurance premium for the Hyundai.

The Foucaults were presumably required by their lender to have collision coverage on the Hyundai as a condition of their automobile loan. For the period from June 8, 1999 to December 8, 1999, the cost of collision insurance for the Hyundai was \$108.00. Assuming the premium was the same for the other twelve months for which they are seeking reimbursement, the total would be \$324.00. Although the Foucaults did not receive a title for the vehicle and could not lawfully operate it, they indicate in their complaint that they did put approximately 4000 miles on the vehicle. No deduction for their use of the vehicle will be made; however, it is reasonable to not reimburse them for the cost of insurance on the vehicle as a trade-off for their use of the vehicle.

11. Robert and Shari Foucault sustained a loss of \$9,042.00 as a result of the Dealer's failure to submit the title and application of title to Department of Transportation within seven business days of the purchase as required by sec. 342.16, Stats., and the Dealer's failure to perform a presale inspection of the vehicle and disclose the conditions and history of the vehicle on a Wisconsin Buyers Guide as required by sec. Trans 139.04, Wis. Adm. Code. Violations of sec. 342.16, Stats., and sec Trans 139.04, Wis. Adm. Code, are, in turn, violations of sec. 218.01(3)(a)14, Stats..

12. The bond claim was filed within three years of the ending date of the period the Peerless Insurance Company bond was in effect and is; therefore, a timely claim.

13. \$9,042.00 of the loss sustained by the Foucaults was caused by acts of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license. Accordingly, this amount of the claim is allowable.

CONCLUSIONS OF LAW

1. Robert and Shari Foucault's claim arose on July 1, 1998, the date they purchased the subject vehicle from JAPCO, Ltd., d/b/a AJ Auto Sales. The surety bond issued to JAPCO, Ltd., d/b/a AJ Auto Sales, by Peerless Insurance Company covers a one-year period commencing on May 15, 1998. The claim arose during the period covered by the surety bond.

2. On May 11, 1999, the Foucaults filed a claim against the motor vehicle dealer bond of JAPCO, Ltd., d/b/a AJ Auto Sales. The bond claim was filed within three years of the last day of the period covered by the surety bond. Pursuant to sec. Trans 140.21(1)(d), Wis. Adm. Code, the claim is timely.

3. The Foucaults' loss was caused by acts of JAPCO, Ltd., d/b/a AJ Auto Sales, that would be grounds for suspension or revocation of its motor vehicle dealer license. The Foucaults have submitted documentation to support a claim in the amount of \$9,042.00. Pursuant to sec. Trans 140.21(1)(c), Wis. Adm. Code, this portion of the claim is allowable.

4. The Division of Hearings and Appeals has authority to issue the following order.

ORDER

The claim filed by Robert and Shari Foucault against the motor vehicle dealer bond of JAPCO, Ltd., d/b/a AJ Auto Sales is APPROVED in the amount of \$9042.00. Peerless Insurance Company shall pay the Foucaults this amount for their loss attributable to the actions of JAPCO, Ltd., d/b/a AJ Auto Sales and the Foucaults shall surrender possession of the vehicle to Peerless Insurance Company.

Dated at Madison, Wisconsin, on March 24, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.